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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 360

W. E. CALLISON,

Appellant,

vs.

THE STATE OF TEXAS.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

Title 28, Sec. 350 U. S. Code, reading "No writ of error, *appeal* or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained, unless application therefore duly be made within three months after the entry of such judgment or decree." • • •

Gypsy Oil Co. v. *Escoe*, 275 U. S. 498.

Also Title 28, Sec. 344, U. S. Code provides: "It shall be competent for the Supreme Court, by Certiorari (also appeal), to require that there be certified to it for review and determination, with the same power and authority and with like effect, as if brought up by Writ of Error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question. * * *"

Fisk v. *State*, 274 U. S. 380.

B.

Date of Decree and Date of Application for Appeal.

Decree or final judgment sought to be reviewed was entered and became final on June 2, 1943, when the Texas Supreme Court overruled motion for rehearing to grant writ of error (See Transcript of the record, page 81). Said judgment and opinion was rendered by the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas on December 31, 1942, affirming the judgment of the Trial Court (See Transcript of the record, pages 69-70). Thereafter said judgment became final on June 2, 1943. Thereafter petition for Appeal to this Court was presented and filed with said El Paso Court of Civil Appeals on July 29, 1943 (See Transcript of the record, page 83).

The Record is possessed by said El Paso Court of Appeals.

C.

Nature of Case and Ruling Below.

This suit was an application for the State of Texas by and through Dean Gaulding, Criminal District Attorney of Dallas County, Texas, for an order authorizing and directing the destruction of certain gambling machines and devices seized from unknown owners. Among the property thus taken was "Grab Bowls" two with no numbers, also known

and described as "Callison Quiz Programs," see transcript page 2, being first page of plaintiff's application to destroy. At the time of the seizure Intervenor was well known to the District Attorney, as was the Callison Quiz Advertising Program. A hearing was had in the 101st District Court of Dallas County, Texas, and on February 10, 1942, said court decided said programs were gambling; see Judgment Trans. p. 17-24. Thereafter the court filed Findings of Fact, and Conclusions of Law; see Trans. p. 15-17; wherein the Callison Quiz Programs were found by the court to be of the value of $1,000.00; see Trans. p. 16; appellant's intervention and answer see Trans. p. 8-14 and proof, see Statement of Facts show the Callison Quiz Advertising Program to be a test of skill, education and entertaining and therefore intervenor appealed from said judgment Trans. p. 24. The ownership of said Grab Bowls is and was in W. E. Callison, and were taken without process and not operating while on display. Thereafter on the 31st day of December, 1942, the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, at El Paso, affirmed the judgment of the lower court. From said ruling of the court, this application for Writ of Error before the Supreme Court is sought. On April 1, 1943, the court overruled motion for rehearing with notation "no opinion" overruling same. Issue was made that appellant's property was seized without process and said advertising programs never functioned. Statement of Facts, 4-1-21.

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court and the State of Texas are believed to sustain jurisdiction of this Appeal:

School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94;
Horner v. *U. S.*, 147 U. S. 449;

Houghton v. *Payne*, 194 U. S. 88;
U. S. v. *Rosenbaum*, 121 Federal 180;
Ealge v. *Voorhiss*, 181 Federal 579;
Boatwright v. *State*, 38 S. W. (2) 87, "A game where players secure a checker problem by punch board and obtain a prize as a reward for skill by solving the problem; held not a lotter-."
McRae v. *State*, 81 S. W. 741, as follows: "Holding a rack upon which knives are displayed and over which a ring was thrown, has been held not to be a lottery, the practice of skill being called for."
Article 111, Section 1 of the U. S. Constitution, contains the following: "The Judicial Power of the United States shall be vested in one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."
Article 111, Section 2 of the U. S. Constitution, contains the following: "The Judicial Power shall extend to * * * controversies betwen a State and citizens of another State;" Appellant is and was a citizen of the State of Oklahoma. See Transcript P. 6, l. 1, and was precluded from asserting citizenship, because he could do no other than intervene in the (State) Trial Court, Tranecript P. 8, l. 4, wherein the State of Texas filed a petition or application to destroy appellant's property, together with other property unclaimed.

We respectfully submit that this Court has jurisdiction of this Appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

A. S. Baskett,
Counsel for Appellant.

(Note) "All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the El Paso Court of Civil Appeals, El Paso, Texas, and on file with the Clerk of this Court. The record has not yet been printed."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 360

W. E. CALLISON,

Appellant,

vs.

THE STATE OF TEXAS.

SUPPLEMENTAL STATEMENT AS TO JURISDICTION ON APPEAL.

May It Please The Court:

The Appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal submits his Supplemental Statement of Jurisdiction and respectfully represents:

A1.

Statutory Provision Sustaining Jurisdiction.

In prohibiting the Callison Quiz Advertising Program, the State authorities, so act in violation of the Federal Constitution, which deprives the Appellant of his rights to en-

joy the profits by reason of the exercising of his ability to compose, as described in the Callison Quiz Advertising Program. See Exhibit in transcript of Statement of Facts, Reference to U. S. Consttiution, Article I, Section 8, Paragraph 8 reads:

> "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;"

A2.

Appellant asserts that the Courts of the State of Texas are discriminating against him in that others are permitted to participate and indulge in an industry equal and parallel to the industry of appellant's, but by the reason of this decree appellant is in effect prohibited. Again cite *Boatwright* v. *State*, 38 S. W. (2) 87, holds in a similar contest, that the Texas Penal Code, 1925, Art. 654, is not violated. This case decided by the Texas Court of Criminal Appeals, the Court of last resort. Also in support thereof and in point, *McRae* v. *State*, 81 S. W. 741. The United States Constitution, Article IV, Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The 14th Amendment U. S. Constitution is referred to in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C.

Nature of Case and Ruling Below.

A mistake was made in that the words at the end of this part "C" were transcribed by mistake, and this correction is made by striking out the following: "Issue was made that Appellant's property was seized without process, and said advertising programs never functioned." The above should also be disregarded; it is not supported by the record.

Statement supplemented is

Respectfully submitted,

A. S. Baskett,
Counsel for Appellant.

APPENDIX.

COURT OF CIVIL APPEALS, EL PASO.

No. 4260.

W. E. CALLISON, *Appellant*,

vs.

THE STATE OF TEXAS, *Appellee*.

Appeal from the District Court of Dallas County, Texas.

This is an appeal from the 101st District Court of Dallas County.

The suit was originally instituted by the State, through the District Attorney of Dallas County, for the destruction of certain equipment, paraphernalia, machines and devices claimed to have been used and operated for gaming purposes contrary to the provisions of the criminal laws of the State. Among the lot were two units called "Callison Quiz Advertising Programs." Appellant, W. E. Callison, intervened and claimed these units and sought to avoid their destruction.

The trial was to the court without a jury, and judgment entered condemning the property and directing its destruction. From that judgment this appeal has been brought.

Callison has three assignments of error and has briefed four propositions. As we understand them they present two questions. His first position is, his property or game is not a gambling device within the meaning of Art. 619, Penal Code, because it is a game in which skill predominates rather than chance; and secondly that his property was illegally seized without warrant.

The devices consist of a placard approximately 12 by 18 inches and a glass bowl similar to a fish bowl. Across the top of the placard is the name given above in large type. Then follows in large, plain type in red a suggestion that the rules be read carefully before participation in the program; then an explanation why it is not regarded by the

owner as unlawful, and then 17 rules of the game. The lower left approximately one-third of the placard is ruled off into three columns. In the left column are twelve combinations of numbers, 101-102-103, etc. to 112-113. In the next column to the right and opposite each combination of numbers is a question, and in the third column the value of the correct answer to the question, e. g., opposite 101-102 is the question: "Does a peace officer have a right to destroy or dispose of seized property at will without a court order?" The value of the correct answer is $1.00. The values then diminish in order to 75¢, 50¢, 40¢, 40¢, 30¢, 25¢, 20¢, 15¢, and the last four for 10¢ each. The last question is: "Do persimmons grow in Texas?"

There are 1836 capsules in the bowl containing numbers for each of which there is a question. There are twelve for each of the twelve combinations of numbers on the board. Mr. Callison explained in his testimony that there were in the bowl 132 capsules containing the one dollar combination against 1704 that did not.

The participant paid 5¢ for the privilege of drawing a capsule containing a number from the bowl. Rule 2 required him to segregate his question from the group displayed on the board and disclose the correct answer in thirty seconds. If he were unable to complete the performance within the thirty seconds, or, if his answer be incorrect, he lost his nickel. If within time and his answer be correct, he received the amount opposite his number combination and question, ranging from 10¢ to one dollar, as above indicated. It cannot be known what the number will be until it is drawn and removed from the capsule.

The numbers and questions were subject to change at the will of the possessor.

Mr. Callison explained the advertising feature of the program briefly thus: Any advertiser might sponsor any question, "for instance, the answer to the following question is paid for with the compliments of the North American Cafe, 403 North Bishop, Dallas, Texas." That is the 25¢ question. "It is so arranged that 153 advertisements could be placed on a card; for instance, a department store could ask 153 questions about 153 different pieces of merchandise."

The two pieces of equipment involved in this case were picked up by Dallas police officers, one in a cafe on North Harwood and the other in an Oak Cliff Cafe. Each was on the counter by the cash register.

We are of the opinion they are "gaming devices" within the meaning of Art. 619, Penal Code of Texas, which makes it unlawful to "keep or exhibit for the purposes of gaming any policy game * * * or device of any name or description whatever * * * or device for the purpose of gaming which has no name * * *."

Our code does not define game or gaming, nor does the statute make any distinction between games of chance and games of skill. Texas Courts have made no such distinctions. In the early case of Stearnes *v.* State, 21 Tex. 692, the Supreme Court, on a consideration of the statute containing the language above quoted, defined a game as follows: "A game is a trial of skill or of chance, or of skill and chance, between two or more contending parties, according to some rule, by which each may succeed or fail in the trial." This rule was held to be correct in Toler *v.* State, 56 S. W. 917. As we understand the opinion in Adams *v.* Antonio, 88 S. W. (2d) 503 (writ refused), that definition was again recognized as correct. In this latter case it is said that it was unnecessary to determine whether the game played is one of chance or skill for the reason the statute makes no such distinction (bottom first column, p. 505). The contention that skill predominates avails nothing. The inducement and lure of this game is the odds ranging from two to twenty to one. In an application of this statute we think the proper test is, does it encourage the gambling instinct? Under the facts here the answer is obvious. The first gamble here is that the participant can and will draw a number of greater value than the minimum, and secondly, that he can give the correct answer held by the possessor or exhibitor.

Mr. Callison testified these devices were placed in operation and to be operated in accordance with the rules and for the fee of 5¢; that they were open to the whole public, to any and all who desired to participate. That they were kept and exhibited within the meaning of Arts. 619 and 623 is too apparent to require comment.

On the second question the facts are: Mr. Callison testified he called on the Chief of Police of the City of Dallas and explained to him his program, and told him he was going to place them in operation. He was advised they would be picked up. He placed them in the places where found, and says he telephoned the Chief where one of them was, and is not sure that he did or did not tell him where the other was. Police officers picked them up. They were in places of business owned and operated by others and not by Callison.

The Court of Criminal Appeals has held consistently and many many times that a defendant cannot complain that a search and seizure is unlawful unless he is the owner or operator of the place, or has some interest therein. We cite but one case: Pharis *v.* State, 131 S. W. (2d) 965. Moreover, it has likewise been held a search and seizure of slot machines under the statutes here under consideration in places operated by others than the claimant is not unlawful. Moore *v.* Adams, 91 S. W. (2d) 447. This proposition cannot, therefore, be sustained and is overruled.

There is no error in the trial court's judgment, and it is affirmed.

C. R. Sutton,
Associate Justice.

Filed December 31, 1942.
Not for publication.

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